Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1558

NATIONAL HOCKEY LEAGUE, et al.,

Petitioners,

v.

METROPOLITAN HOCKEY CLUB, INC.,
and GOLDEN BLADES HOCKEY, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Counter-Statement of the Questions Presented	1
Counter-Statement of the Case	3
A. Introduction	3
B. Background of the Litigation	4
C. The February 19, 1974 Settlement between the NHL and WHA	6
D. The Pretrial Proceedings Subsequent to the Settlement	7
(1) Denial of Access to Lead Counsel's Files	7
(2) Petitioners' Interrogatories	8
(3) Respondents' March 13, 1974 Motion to Dismiss	10
(4) Respondents' Answers to Petitioners' Interrogatories	11
(5) The April 15 Order and the Filing of Supplemental Answers to Petitioners' Interrogatories	11
(6) Respondents' Inadvertent Failure to File Supplemental Answers to the 56 "Damage" Interrogatories on June 14, 1974 ..	14
E. The District Court's July 3, 1974 Order of Dismissal	16
F. The Third Circuit's Reversal of the Dismissal Order	17
Discussion of the Reasons Why the Writ Should be Denied	19
Conclusion	28

TABLE OF AUTHORITIES

Cases: PAGE

Diapulse Corp. of America v. *Curtis Publishing Co.*, 374 F.2d 442 (2d Cir. 1967) 21, 23

DiGregorio v. *First Rediscount Corp.*, 506 F.2d 781 (3d Cir. 1974) 20, 26

Dunbar v. *United States*, 502 F.2d 506 (5th Cir. 1974) 21

Edsall v. *Penn Central Transportation Co.*, 479 F.2d 33 (6th Cir. 1973), cert. den. 414 U.S. 1040 (1973) 26

First National Bank of Washington v. *Langley-Howard, Inc.*, 381 F.2d 207 (3d Cir. 1968) 4

Fischer v. *Buehl*, 45 F.2d 950 (3d Cir. 1971) 26

Flaks v. *Koegel*, 504 F.2d 702 (2d Cir. 1974) 21, 26

Fox v. *Studebaker-Worthington, Inc.*, 516 F.2d 989 (8th Cir. 1975) 23, 26

Gill v. *Stolow*, 240 F.2d 669 (2d Cir. 1957) 22, 23, 27

Hammond Packing Co. v. *Arkansas*, 212 U.S. 322 (1909) 20

Hastings v. *Maritime Overseas Corp.*, 411 F.2d 1201 (3d Cir. 1969) 20, 26

Hovey v. *Elliot*, 167 U.S. 409 (1897) 20

In Re Josephson, 218 F.2d 174 (1st Cir. 1954) 23

Industrial Building Materials, Inc. v. *Inter Chemical Corp.*, 437 F.2d 1336 (9th Cir. 1970) 17

Kakuwa v. *Sanchez*, 498 F.2d 1223 (9th Cir. 1974) .. 21

Link v. *Wabash R.R.*, 370 U.S. 626 (1962) 5, 19, 24, 25

Mangano v. *American Radiator and Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971) 20, 26

Robison v. *Trans America Insurance Co.*, 368 F.2d 37 (10th Cir. 1966) 21

Societe Internationale v. *Rogers*, 357 U.S. 197 (1958) 1, 2, 4, 17, 19, 20

Vac-Air, Inc. v. *John Mohr & Sons, Inc.*, 471 F.2d 231 (7th Cir. 1973) 21

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Respondents Metropolitan Hockey Club, Inc. and Golden Blades Hockey, Inc. respectfully oppose the petition for certiorari filed by the National Hockey League and its member teams to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Counter-Statement of the Questions Presented

1. Should petitioners' request for the issuance of a writ of certiorari be granted where the Third Circuit in reversing the District Court's imposition of the drastic sanction of dismissal under Rule 37 *F.R. Civ. Pro:*

> (a) Held that under this Court's controlling decision in *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), the dismissal sanction could only be imposed for "willful, conscious and intentional" non-compliance with the orders of the District Court;

(b) Determined that the dismissal of the action was an abuse of discretion since, among other things, there was "insufficient evidence" to support any finding by the District Court that the conduct upon which the dismissal was predicated, i.e., the inadvertent failure to timely supplement the answers to 56 of 1,150 interrogatories, was "willful, conscious and intentional" within the meaning of *Societe;*

(c) Carefully considered the entire record before the District Court and detailed the many "extenuating factors" which militated against dismissal;

(d) Carefully sought to distinguish between the conduct of respondents and their former counsel who had become adversaries during the course of the litigation;

(e) Concluded that respondents' counsel had "worked frantically to complete all discovery within the deadlines set by the Court" and had exercised "enormous effort after they took control of the case in attempting to complete discovery matters within a brief period;" and

(f) Concluded that under the circumstances of this case the sanction of dismissal was inappropriate and that the District Court had failed to adequately consider the imposition of lesser sanctions?

2. Should this Court exercise its discretion to grant a writ of certiorari where petitioners have failed to demonstrate that (a) the decision of the Third Circuit is in conflict with the applicable decisions of this Court or of the other circuit courts of appeals; (b) that the Third Circuit has decided an important question of federal law which has not been but should be, settled by this Court; or (c) that the Third Circuit so departed from the accepted and usual course of judicial proceeding as to call for the exercise of this Court's power of supervision?

Counter-Statement of the Case

A. Introduction

The decision sought to be reviewed was rendered by the United States Court of Appeals for the Third Circuit on February 23, 1976. The decision reversed an order of the United States District Court for the Eastern District of Pennsylvania (Higginbotham, J.) entered in five consolidated antitrust actions on July 3, 1974. The District Court order had granted petitioners' motion to impose the most drastic sanction provided under Rule 37 *F.R. Civ. Pro*—dismissal with prejudice.

The basis for the dismissal order, which the District Court characterized as the "ultimate supreme penalty" (App. E, p. 22a)[1] was respondents' unintended and inadvertent failure to timely file supplemental answers to 56 of 1,150 interrogatories—interrogatories to which they had previously filed 180 pages of answers and supplemental answers (R. 2231-2350, 2558-2610).[2] The dismissal culminated a five month period subsequent to the decision by respondents not to participate in a settlement negotiated between the World Hockey Association ("WHA") and the National Hockey League ("NHL") and to pursue their antitrust claims with separate counsel. The Third Circuit in its opinion reversing the dismissal order noted that in this five month period, respondents' new counsel had exercised an "enormous effort" and had "worked frantically to complete discovery within the deadlines set by the Court" in the face of an "onerous burden" of prosecuting the massive and complex litigation without access to the files maintained by former WHA counsel (App. A, pp. 14a, 16a).

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[1] "App." reference is to the Appendix to the Petition for Certiorari.

[2] "R" references are to the pages of the Joint Appendix in the Court of Appeals. "RA" references are to the Record on Appeal.

Upon a "thorough review of the record" the Third Circuit concluded that the dismissal constituted an "abuse of discretion" by the District Court and that the "sanction of dismissal was improper under the circumstances of this case" (App. A, pp. 5a, 17a). The Court of Appeals stated:

> "After carefully reviewing the record, we conclude that there is insufficient evidence to support a finding that [respondents'] failure to file supplemental answers by June 14, 1974 was in flagrant bad faith, willful or intentional. We believe that under all of the circumstances the extreme sanction of dismissal was unwarranted. Extenuating factors were present. [Respondents'] counsel exercised an enormous effort after they took control of the case in attempting to complete the discovery matters within a brief period" (App. A, p. 16a).

The Third Circuit's decision, we believe, is only the second reported instance in which that Court has reversed an order of dismissal under Rule 37(d) since this Court's decision in *Societe Internationale* v. *Rogers*[3]—a reversal which, we submit, was necessitated by the unique facts of the case. The opinion of the Circuit Court makes clear that the controlling standard of *Societe* was scrupulously followed and as discussed below, the decision is in complete accord with those of the other circuit courts of appeals.

B. Background of the Litigation

The actions below were part of a complex of antitrust litigations between the fledgling WHA and the older, established NHL. Fifteen separate law suits between the

[3] 357 U.S. 197 (1958). The first, and we believe the only other instance in which the Third Circuit has reversed an order of dismissal under Rule 37(d) was in *First National Bank of Washington* v. *Langley-Howard, Inc.*, 381 F.2d 207 (3rd Cir. 1968).

two leagues and their member clubs were consolidated in the Eastern District of Pennsylvania in October, 1972 by the Judicial Panel for Multi-District Litigation pursuant to 28 USC §§ 1404(a) and 1407(a). The main action between the two leagues, *World Hockey Association* v. *National Hockey League*, CA72-1995, included as a party-plaintiff, respondent Metropolitan Hockey Club, Inc. ("Metropolitan"), a corporation which owned and operated the WHA's New York franchise known as the "New York Raiders." The WHA parties in these actions were represented by lead counsel, Harold Kohn, a well known and highly experienced antitrust lawyer.

As a result of what the WHA contended was a "preemptive expansion" by the NHL and other predatory practices (R. 106-117), Metropolitan experienced immediate financial difficulties and the WHA in November 1972 took over operation of the New York franchise for the balance of the WHA's initial season (R. 1995, 2147, 2898). On May 14, 1973, respondent Golden Blades Hockey, Inc. ("Golden Blades") a newly-organized Delaware corporation, acquired the assets of Metropolitan (R. 2086, 2898-99).[4] Golden Blades experienced similar financial difficulties and on November 20, 1973 the WHA announced

[4] In an apparent effort to buttress their argument under *Link* v. *Wabash R.R.*, 370 U.S. 626 (1962) the petitioners suggest that the law firm of Golenbock and Barell was so involved in the affairs of Golden Blades, that "it would seem pointless to try to distinguish between attorney and client" (Petition p. 7, fn. 4). In this respect they have, to say the least, taken liberties with the facts. Thus, for example, they state that the corporation was "newly organized by Golenbock and Barell, a New York law firm" and that a "block of Golden Blades stock went to Golenbock and Barell" (Petition p. 4). The new corporation, however, was "organized" by its incorporators and officers Ralf Brent, Lee Matison and Lawrence Stern, businessmen who had no connection with Golenbock and Barell except as clients (R. 2238). The "block" of stock was a mere 30,000 shares out of a total issued of 1,040,000 for which the firm paid $3,000 (R. 2507, 1789).

that it had revoked its franchise and moved the team to Cherry Hill, New Jersey (R. 1793-4).

C. The February 19, 1974 Settlement between the NHL and WHA

Settlement negotiations between the WHA and NHL to settle the antitrust actions had continued periodically since the spring of 1973. These negotiations were intensified after the November revocation of the Golden Blades franchise and resulted in a settlement of all actions on February 19, 1974 (R. 1271, 1452-1520). Metropolitan and Golden Blades (collectively "M-GB") were not advised of the settlement discussions by lead counsel Mr. Kohn and in fact, first learned of the existence of the discussions and a "tentative agreement" as a result of a *New York Times* article on January 15, 1974 (R. 1271, 1293). M-GB's general counsel, the New York firm of Golenbock and Barell thereupon requested the opportunity to review Mr. Kohn's files in order to evaluate M-GB's posture in the litigation and the settlement (R. 1293-4). Mr. Kohn refused to make the files available to them on the ground that M-GB and the WHA had, as a result of the termination of M-GB's franchise, been placed in an adversary position (R. 1204).[5] Golenbock and Barell then filed a separate appearance on behalf of M-GB in the Philadelphia actions in February 1974 (R. 1272-74).

The February 19, 1974 settlement terminated the litigations as to all WHA parties except M-GB. The settlement provided *inter alia* for payment by the NHL to the WHA of $1,750,000 in counsel fees and the playing of 15 exhibition games between teams of the two leagues. Significantly, the settlement included a provision by which the WHA

[5] In fact, in February 1974, the WHA commenced an action against Golden Blades in Supreme Court, New York County entitled *World Hockey Association* v. *Golden Blades Hockey, Inc., Ralf Brent, Lee Matison, Lawrence Stern, et al.*

agreed to indemnify the NHL up to $1,750,000 for any liability to M-GB as a result of the litigation (R. 1452-1520).

D. The Pretrial Proceedings Subsequent to the Settlement

On February 20, 1974, the day after entry of the consent decree, Golenbock and Barell, now in charge of the litigation for M-GB met with counsel to the NHL and the Court to discuss the future course of the litigation. At this conference, the Court apprised the parties that the March 18, 1974 trial date would be adhered to, and that all parties should do whatever was necessary so that the trial would commence on the announced date. In this respect the Court admonished all counsel to work "no less than six full days" and perhaps "seven days a week" (R. 1550).

(1) *Denial of Access to Lead Counsel's Files*

At the February 20th conference, M-GB's new counsel sought the Court's assistance in gaining access to files held by Mr. Kohn including copies of the pleadings, motions and documents produced in the litigation by Metropolitan during the time of its operation by the WHA so as to enable it to prepare for trial (R. 1550). Mr. Kohn had claimed a lien on the file for the entire amount of legal fees and costs rendered to the WHA in the amount of $1 million and refused to release the files to M-GB until he was paid (R. 1523-24).

Golenbock and Barell was required to work the next six days, including the intervening weekend to prepare and respond to cross-motions addressed to Mr. Kohn's claimed lien (R. 3014-16). At a pretrial conference on February 26, 1974, the Court entered an order recognizing a lien in favor of Mr. Kohn and his firm on "all papers relating to and arising out of this litigation and now under their control" (App. G, p. 167a). The order also required M-GB to post sufficient surety to satisfy in excess of $50,000 of the lien, holding that it "could be obligated to pay the total legal fees and related costs expended by the WHA . . .

[which] could approximate $1 million" (App. G, pp. 179a-180a).[6]

As noted by the Third Circuit, in its subsequent opinion, the effect of the order was to leave M-GB without copies of pleadings, orders and other crucial discovery documents with only five weeks remaining prior to the commencement of a complex antitrust trial against the well-financed and better prepared NHL who had intimate knowledge of the facts and procedural history of the actions—a situation characterized by the Third Circuit as an "onerous burden" (App. A, p. 14a).

(2) *Petitioners' Interrogatories*

On February 26, 1974 the Court requested the parties to agree on a pretrial schedule consistent with the April trial date (R. 1924). Counsel for M-GB at this time agreed to the demand of the NHL counsel that they answer the NHL's interrogatories in two weeks by March 11, 1974 (R. 1925). These interrogatories (R. 590-704) had been previously served in the spring of 1973 in the actions then pending in the Eastern District of Pennsylvania and answers served by Mr. Kohn on behalf of the WHA and its member teams (R. 817-1071, 1082-86) had been deemed by the NHL to be inadequate. The interrogatories had been one of the subjects of negotiations between the NHL and WHA attorneys which at the instance of the Court had been directed to a host of outstanding discovery motions during the eight month period between June 1973 and the February 1974 settlement (R. 1218, 1251-52).[7] No

[6] The District Court at this time also considered M-GB's motion for a continuance of the March 18th trial date but granted only a brief adjournment to April 1st or April 8th (R. 1924, 1930).

[7] These motions included: (i) WHA plaintiffs' motion to compel answers to interrogatories (RA. 142); (ii) NHL defendants'

(*footnote continued on following page*)

resolution of these matters had ever been reached and by a series of court approved stipulations, the parties had periodically postponed the deadline for completion of discovery to well beyond the initial date which the Court had set for trial of the actions (R. 1214, 1227).[8]

At the time of their commitment to answer the interrogatories by March 11th, M-GB's new counsel had not seen or had an opportunity to review the 114 page set of interrogatories with multiple parts aggregating 1,150 questions nor was it aware that the Court would compel them to defend simultaneous depositions of every officer, director, and major shareholder of M-GB, some occurring in separate cities, during the period February 27 to March 11, 1974 (R. 2152).[9] When the Court directed M-GB to prepare and defend simultaneous depositions on February 27,

(*footnote continued from preceding page*)

motion to compel answers to defendants' first set of interrogatories (R. 792); (iii) NHL defendants' motion to compel production of documents (RA. 173); (iv) WHA plaintiffs' motion to compel production of documents (R. 1147); (v) NHL defendants' motion to compel supplemental answers to interrogatories (R. 1115) and (vi) WHA plaintiffs' motion to compel admissions (RA. 191).

[8] Petitioners' assertion that the discovery disputes had been "resolved" by June 25, 1973 (Petition, p. 8) is contradicted by the record including their own motion to extend the discovery deadline filed on September 28, 1973 (R. 1216-26) and their submission to the Court of "unresolved" matters on February 5, 1974 (R. 1251-54).

[9] Petitioners continue to argue as they did to the Third Circuit, that M-GB's counsel Mr. Wagman had seen the interrogatories prior to February 26, 1974 and had in fact represented in open court that he had read them and had the information to answer them (Petition, pp. 8, 15). Petitioners' argument in this respect exceeds the bounds of legitimate advocacy. Indeed, the entire matter was clarified at the March 14, 1974 argument of petitioners' initial motion to dismiss when Mr. Wagman pointed out to the Court that he had made no such "representation" on February 22, 1974, and in fact, had not seen the interrogatories, whether or not a copy had previously been furnished to his firm by Mr. Kohn in 1973 (R. 2201-04).

1974, M-GB's counsel strenuously protested, pleading that "I will never be able to answer [the interrogatories] by March 11th, if I have to do that, and it is not fair, and it isn't due process" (R. 1965).

(3) PETITIONERS' ~~Respondents'~~ *March 13, 1974 Motion to Dismiss*

As common sense would dictate, M-GB was simply unable to answer the interrogatories by March 11th. On that day, M-GB's counsel hand-delivered a letter to the Court requesting a one week extension of time to complete their answers to the interrogatories, pointing out that M-GB had been involved on a day-to-day basis in defending the simultaneous depositions in the previous two weeks.[10] Counsel also advised the Court that because he had not had an opportunity to review the interrogatories prior to the February 26, 1974 pretrial conference he had not realized that the interrogatories required detailed expositions of plaintiffs' legal theories and contentions involving analysis of thousands of documents from M-GB's files which had been produced on February 28th and 29th (R. 2151-52).[11]

On March 13, 1974, prior to any action on M-GB's request, the NHL moved to dismiss the case based upon M-GB's failure to answer the interrogatories (R. 2172). A hearing was held the following day and the Court denied the defendants' motion to dismiss giving M-GB until March 18th to supply answers to the interrogatories (R. 2225, 2228).

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[10] A chart which graphically depicts this arduous deposition schedule is reproduced in the Joint Appendix at R. 2962-63.

[11] Here it is significant that in July, 1973 with a trial date then scheduled to commence in four months, the NHL had sought a protective order against similar interrogatories served by the WHA stating that it needed not less than 30 days to file objections and 90 days to answer. The NHL protested that the answers would require "a great deal of work" (RA. 211).

(4) *Respondents' Answers to Petitioners' Interrogatories*

M-GB timely submitted 120 typewritten pages of answers to the interrogatories on March 18th (R. 2231-2350), answers which were far more comprehensive than those previously filed by any WHA plaintiff under former lead counsel Mr. Kohn.[12] At a pretrial conference the following day, March 19th, the NHL informed the Court that it intended to file a motion to compel supplementary answers (R. 2351). At the same conference, the Court advised the parties that the trial date was to be adjourned to September 16, 1974. The Court observed that since M-GB was "insolvent" and since there was a risk of mistrial occurring if the trial extended into the summer months, there was no longer any reason to place the litigants under "extraordinary pressures" as it had previously done (R. 2353-54).

(5) *The April 15 Order and the Filing of Supplemental Answers to Petitioners' Interrogatories*

On March 21, 1974, the NHL filed its motion to compel supplementary answers to certain of the interrogatories (R. 2362). This motion, among other things, sought to compel additional answers to questions concerning financial records of Metropolitan, the location of which had been the subject of extensive deposition testimony. This testimony had revealed that these financial records were in the possession of third parties such as attorneys and accountants who had asserted retaining liens over them (R. 1990-2049). The motion also requested supplemental answers to 56 of the 1,150 interrogatories involving computation of damages. These "damage" interrogatories sought to require M-GB to compartmentalize their damages and to attribute specific dollar amounts to particular acts of defend-

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[12] This fact has never been disputed by petitioners; we urge the Court to compare M-GB's answers (R. 2231-50) with the answers filed by Mr. Kohn in May, 1973 (R. 817-1071).

ants alleged in the complaint to have been in furtherance of the conspiracy to monopolize such as, for example, "blacklisting" (R. 619-20) and the issuance of disparaging statements about the WHA (R. 621-22). M-GB was given only one and one-half days to respond to the motion (R. 2977). The motion was argued on March 25, 1974 (R. 2398) and a decision compelling supplemental answers was filed by the Court on April 15, 1974 (R. 2483).

The Court's April 15th order set forth six "guidelines" and three "deadlines" for providing supplemental answers. A substantial number of the answers were to be filed by April 29, 1974. Other interrogatories which M-GB claimed they could not answer because of inadequate discovery were to be answered no later than July 25, 1974. Answers to a third category of interrogatories, the 56 dealing with M-GB's damage claims, were to be supplemented by June 14, 1974.

The April 15th order was hardly a model of clarity and caused confusion to all parties. Thus, as a result of the fact that the June 14th "deadline" for answering the 56 "damage" interrogatories appeared separate and apart from the other "guideline" dates and was confusingly juxtaposed with the July 25th date (compare pp. 1, 2 and 7 of the order at R. 2483-84 and 2488-89) the June 14th date was inadvertently omitted from pretrial schedules prepared by the managing clerk in the office of M-GB's counsel (R. 2982, 3008-09). The petitioners' attorneys also misinterpreted the order believing that the June 14th date was not limited to the 56 "damage" interrogatories, but rather, was applicable to a broad series of additional interrogatories concerning M-GB's "financial structure, financial dealings and other aspects of their financial opertions" (R. 2744).[13]

[13] Thus, defendants later argued that the June 14th deadline was imposed so as to give M-GB an opportunity to "retrieve its

(*footnote continued on following page*)

On April 24, 1974, M-GB sought an extension of the April 29th deadline because the District Court clerk's office, under the press of other Court business, was unable to timely reproduce several hundred documents from the Court files which M-GB required in connection with the preparation of supplemental answers (R. 2503, 2985).[14] The Court extended the deadline to May 6, 1974 (R. 2532). M-GB timely filed 60 pages of supplemental answers on May 6, 1974 (R. 2558-2609). Included in these supplemental answers were answers to several of the "damage" interrogatories (R. 2982).

(*footnote continued from preceding page*)

financial records" from the various entities who had possession of them and "to give defendants a fair opportunity to study M-GB's answers and financial documents and take additional depositions . . . concerning these financial matters prior to the close of the period for depositions. . . ." (R. 2743, 2827-30). This contention was rejected by the District Court in its July 3, 1974 dismissal order.

[14] Petitioners suggest that M-GB was derelict in that "it waited until April 17, 1974 before ordering the clerk to reproduce the hundreds of documents it said it needed to satisfy its discovery obligations", observing that M-GB was able to obtain other documents from the Court file "in time" for use in their "case in chief" (Petition, p. 11, fn. 10). Petitioners neglect, however, to reveal that subsequent to the February 26th order denying M-GB access to Mr. Kohn's files, M-GB had unsuccessfully attempted to arrange with the Court for reproduction of documents contained in the massive Court file by a method which would have eliminated dependence upon the clerk's xerox facilities and at a cost appreciably below the Court's established xerox charge of $.50 a page (R. 2136). When this request was denied (R. 2154) M-GB's attorneys spent many days reviewing the massive files so as to reduce the potentially enormous cost of copying at the Court established price (R. 2983-85). Petitioners also neglect to reveal that the documents reproduced by M-GB in connection with their "case in chief" consisted of several exhibits to depositions (see appendix to brief of defendants-appellees' below)—hardly comparable to the expense of reproducing the "hundreds of documents" necessary to comply with the Court's April 15th discovery order (App. E, p. 38a).

(6) Respondents' Inadvertent Failure to File Supplemental Answers to the 56 "Damage" Interrogatories on June 14, 1974

As a result of the omission of the June 14th date from their calendar of dates and deadlines, M-GB failed to file supplemental answers to the 56 "damage" interrogatories on June 14th. As noted by the Third Circuit in its opinion (App. A, p. 9a), M-GB's counsel for the six weeks prior to June 14, 1974 had been involved on a day-by-day basis in taking over 3,500 pages of depositions (R. 2986-89) in addition to preparing and arguing the responses to numerous motions filed by defendants for protective orders and working on many other aspects of this litigation (R. 2558-2726).[15]

On June 14, 1974, at the close of oral argument on cross-motions by both sides to compel responses to requests for admissions and of defendants' motion for various protective orders, defendants' counsel announced that they would be filing a motion to dismiss. When M-GB's counsel asked the basis of the motion, they were advised only that it was "for refusal to make discovery" (R. 2993). The next day, Saturday, June 15, 1974, upon their return to New York City, M-GB's counsel reviewed its files and pending motions in discovery proceedings and discovered the omission of the June 14th deadline from their calendar prepared by the firm's managing clerk (R. 2993). On Monday, June 17th, the next business day, M-GB's counsel hand-delivered a letter to defendants' local counsel requesting an extension of the June 14th date and suggesting that the time for the supplemental answers to the "damage" interrogatories be extended to July 25, 1974, the same date that supplemental answers to other interrogatories were due. The letter

[15] For a chronological summary of all of M-GB's pretrial activities, see R. 3011-70.

stated that if this were not acceptable, that defendants suggest an alternative date that would be satisfactory to them (R. 2730, 2994). The following day, June 18, 1974, defendants' counsel advised that they would not agree to an extension and confirmed that the failure to supplement the interrogatory answers on June 14th was the basis of the motion they intended to file (R. 2730, 2994). M-GB thereupon immediately filed a motion to extend their time to answer the 56 "damage" interrogatories to July 25, 1974 (R. 2727).[16]

Subsequent to the filing of a motion for an extension, the NHL on June 19, 1974 filed its motion to dismiss (R. 2732). M-GB was given only 48 hours to Saturday, June 22, 1974 to submit opposing papers (R. 2994-95). When M-GB protested this palpably insufficient period, the time was extended but only until Monday, June 24, 1974 (R. 2774). The motions were argued on June 26, 1974 (R. 2839) at which time M-GB's counsel in answer to the Court's question explained that the answers had not been filed due to an inadvertent "targeting" of the wrong date:

> "Mr. Wagman [M-GB counsel]: Because we felt that we had to the extent that we had information available to us, we had supplemented those answers in May, and that by July 25th we were going to answer all the remaining supplemental—give the court and our adversaries all the remaining supplemental answers.

[16] Petitioners suggest that receipt of the supplemental answers on July 25th would have been after termination of discovery and would have deprived the "defendants of any opportunity to question M-GB about the information produced" (Petition, p. 11). In fact, the information defendants claimed they needed for further discovery was the financial records in possession of third parties (R. 2743, 2827-30). The Court in its April 15th order did not require answers concerning these records until July 25th, after the close of discovery (R. 2488, 2489 and App. E, p. 37a, fn. 7). In any event the Court could have postponed the time for discovery until after July 25th, without disturbing the September trial date.

That was the deadline date we had targeted, July 25th to supplement any answers we hadn't supplemented in May'' (R. 2878) [Emphasis supplied].

Mr. Wagman further emphasized to the Court that having devoted substantial time and effort to the case, M-GB's counsel would not knowingly or willfully have disregarded the deadline (R. 2880-81).

E. The District Court's July 3, 1974 Order of Dismissal

On July 3, 1974, the District Court granted Petitioners' motion and dismissed each of the five pending actions with prejudice under Rule 37(b)(2)(C) and (d):

(1) The Court found that the respondents' failure to file supplemental answers on June 14th and their failure to meet the prior "deadlines" of March 11th and April 29th was "willful noncompliance" with "the Court's critical orders" (App. E, p. 22a). It characterized the failure to timely meet these deadlines as evidencing a "callous disregard of responsibilities . . . owe[d] to the Court and to their opponents'' (App. E, p. 50a);

(2) The Court completely ignored respondents' efforts to obtain an extension from petitioners during the period June 15th to June 18th and in fact, suggested that M-GB had "compounded [their] noncompliance by waiting until five days afterwards before they filed any motions." The Court characterized this "noncompliance" as "flagrant bad faith" (App. E, pp. 50a-51a);

(3) The Court also stressed that the interrogatories had remained substantially unanswered for "seventeen months" (App. E, p. 50a). In this respect, the Court's opinion paraphrased whole sections of defendants' brief which charged M-GB with an array of so-called "defaults'' purportedly committed prior to February, 1974 when the

actions were being handled by Mr. Kohn.[17] The Court ignored the fact that from June 7, 1973 to the date of settlement, the parties were negotiating at the Court's request in order to resolve a host of discovery matters including the question of whether and to what extent the WHA parties would be required to file supplemental answers to interrogatories.

F. The Third Circuit's Reversal of the Dismissal Order

The Third Circuit upon a "thorough review" of the record reversed the District Court's dismissal order on February 23, 1976. Among other things:

(1) The Circuit Court concluded that there was "insufficient evidence" to support a finding by the District Court that M-GB's failure to file supplemental answers to the "damage" interrogatories by June 14th was "flagrant bad faith, willful and intentional" (App. A, p. 16a) within the standard enunciated by this Court in *Societe Internationale* v. *Rogers, supra.* The Circuit Court specifically noted Mr. Wagman's explanation to the District Court during oral argument on June 26th as to the inadvertent "targeting" of the wrong date for supplementing these answers and the fact that M-GB had, on the first business day following the discovery of the mistake sought an extension of time from defendants' counsel (App. A, p. 16a);

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[17] The Court's virtual line-by-line adaptation of defendants' version of the facts contained in their memorandum in support of their motion to dismiss is shown by comparing App. E, pp. 25a-30a, 31a-36a, 38a of the opinion with R. 2736-39, 2739-41, 2743 of the memorandum. Here we would note that in *Industrial Building Materials, Inc.* v. *Inter Chemical Corp.*, 437 F.2d 1336, 1339-40 (9th Cir. 1970) the Ninth Circuit Court of Appeals sharply criticized similar reliance on an advocate's view of disputed facts suggesting that it was incompatible with the duties of an impartial judge. There, as in the present case, the adopted findings were interlaced with an inordinate amount of "invective, scorn and unnecessary criticism."

(2) The Circuit Court also found that there was nothing disclosed in the Court's opinion to indicate that it had considered an alternative sanction before imposing the stringent sanction of dismissal holding that it was "incumbent on the court in exercising its reasoned discretion to review the possible use of an alternative sanction" (App. A, p. 11a);

(3) The Circuit Court also took cognizance of several important "mitigating" factors which the District Court failed to consider such as the "onerous burden" placed upon M-GB's counsel as a result of the decision enforcing Mr. Kohn's attorney's lien—a decision which "left [M-GB] with almost no discovery materials . . . [in] a complex antitrust case scheduled for trial in five weeks" (App. A, p. 14a). It stressed that even with this handicap, M-GB's new counsel had nonetheless "exercised an enormous effort after they took control of the case in attempting to complete the discovery matters within a brief period" and that they had "worked frantically to complete discovery within the deadlines set by the court" (App. A, pp. 16a, 14a).

(4) The Circuit Court also observed that it was error for the District Court to hold that M-GB was in "default" for "seventeen months" in answering the interrogatories where for eight months prior to February 20, 1974, the parties and the Court had permitted negotiations directed to so-called "inadequate" interrogatory answers and other discovery matters to languish unresolved and where M-GB had been represented by different counsel which had since become its adversary (App. A, pp. 12a-13a).[18]

[18] In this respect, it should be noted that the statement defendants attribute to M-GB's prior counsel Mr. Kohn at page 7 of their petition as to the inadequacy of the answers he filed on behalf of Metropolitan on May 25, 1973 was made in the course of the adversarial proceeding between Mr. Kohn and M-GB dur[illegible]g

(*footnote continued on following page*)

On March 1, 1976, the Third Circuit denied defendants' application for a rehearing of the decision in banc (App. C, p. 19a).

Discussion of the Reasons Why the Writ Should Be Denied

Petitioners in separately numbered paragraphs at pages 16-23 of the petition advance five reasons for granting the writ of certiorari. These are discussed in the same order as presented in the petition.

1. Initially, petitioners urge that the Third Circuit misapplied the applicable standard set forth in *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958) by holding that noncompliance with a discovery order must be "willful, conscious and intentional" in order to support the drastic sanction of dismissal. They contend upon the basis of *dicta* in *Link* v. *Wabash R.R.*, 370 U.S. 626, 636 (1962) that dismissal is also proper where noncompliance is "a product of neglect". On this basis, they urge certiorari to avoid the "demise of the dismissal sanction as an indispensable component of the carefully constructed discovery rules" (Petition, pp. 16-18).

It is submitted that the Circuit Court correctly interpreted and applied the standard of *Societe*. The Circuit Court was cognizant of, and in fact, thoroughly discussed

(*footnote continued from preceding page*)

oral argument of the attorney's lien motion (R. 2738, 1731-34). Significantly, this unsworn statement had never been included in the written summaries of all contact between Mr. Kohn's office and M-GB prepared at the Court's request (R. 1525, 1530). Moreover, on May 31st, 1973, six days after filing the answers, Mr. Kohn forwarded copies to Metropolitan's then general counsel, the New York law firm of Paul, Weiss, Rifkind, Wharton & Garrison, making no reference to the inadequacy of the answers. Neither did he request additional answers (R. 1759). At the same time, Mr. Kohn advised the Court that his office "answered in good faith everything they asked us to answer . . ." (R. 1104).

the due process considerations underlying *Societe* and the prior opinions of this Court in *Hovey* v. *Elliot*, 167 U.S. 409 (1897) and *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909) (See App. A, pp. 11a-12a). In its opinion, the Circuit Court carefully detailed the unique facts of this case which distinguish it from prior Third Circuit decisions affirming Rule 37 dismissals in which "willful, conscious and intentional conduct" was clear and apparent. See e.g. *DiGregorio* v. *First Rediscount Corp.*, 506 F.2d 781 (3rd Cir. 1974) where the plaintiff deliberately spurned the opportunity given her by the Court to remove her attorney as an alternative to dismissal;[19] *Mangano* v. *Amercan Radiator and Standard Sanitary Corp.*, 438 F.2d 1187 (3rd Cir. 1971) (*per curiam*) where plaintiffs after prior default in answering interrogatories had consented to a conditional dismissal order and four months subsequent to the extended deadline had failed to cure their default or to offer any reason for their non-compliance; and *Hastings* v. *Maritime Overseas Corp.*, 411 F.2d 1201 (3rd Cir. 1969) where plaintiff failed to appear for court ordered depositions and offered no excuse for failure to answer interrogatories.

As these decisions demonstrate, the dismissal sanction as an "indispensable component of the carefully constructed discovery rules" has continued to survive since *Societe*. Petitioners' suggestion that the Third Circuit's decision is an aberration which somehow may "spell the demise of the dismissal sanction" is utterly unfounded.

Significantly, petitioners have made no contention, much less a demonstration, that the Third Circuit's interpretation of *Societe* is in conflict with the decisions of the other circuit courts of appeals. In fact, the Third Circuit's requirement of "willful, conscious and intentional" conduct, as

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[19] Significantly, Circuit Judge Rosenn, who wrote the majority decision affirming dismissal in *DiGregorio* voted for reversal in this case.

opposed to "neglect", in order to support a Rule 37 dismissal is in complete accord with decisions of the other Circuit courts. See e.g. *Flaks* v. *Koegel*, 504 F.2d 702, 707-710, (2nd Cir. 1974); *Dunbar* v. *United States*, 502 F.2d 506 (5th Cir. 1974); *Vac-Air, Inc.* v. *John Mohr & Sons, Inc.*, 471 F.2d 231 (7th Cir., 1973); *Kakuwa* v. *Sanchez*, 498 F.2d 1223 (9th Cir. 1974); and *Robison* v. *Trans America Insurance Co.*, 368 F.2d 37 (10th Cir. 1966).

2. Petitioners next contend that the Court exceeded its authorized scope of review by making critical "appellate findings" that (a) M-GB's counsel Mr. Wagman, had not seen the interrogatories when he made his commitment to answer them by March 11, 1974, and (b) that the failure to file supplemental answers by June 14th, was the result of "clerical error". They urge that it is "highly appropriate" for this Court to "review the question whether the courts of appeals have any power at all to make findings of their own in their review of district court actions under Rule 37" (Petition, p. 18).

There were of course, no such "appellate findings" upon which the decision turned. Rather the Third Circuit in compliance with its obligation to thoroughly search the entire record (*cf. Diapulse Corp. of America* v. *Curtis Publishing Co.*, 374 F.2d 442 (2nd Cir. 1967)) concluded that there was "insufficient evidence" to support the District Court's finding that the failure to file supplemental answers to the 56 "damage" interrogatories by June 14, 1974 was "in flagrant bad faith, willfull or intentional" (App. A, p. 16a). In reaching this conclusion, the Court took note of the substantial evidence in the record that the failure to file the supplemental answers was inadvertent and resulted from the failure to properly target the correct date, including Mr. Wagman's own statement to the District Court during oral argument of

the motion to dismiss on June 26th (App. A, p. 16a).[20] The Court clearly made no "appellate finding" that the failure to file the interrogatories was the result of "clerical error" nor was it required to in order to reverse the judgment below.

The alleged "appellate finding" that M-GB's counsel had not seen the interrogatories was merely a statement in the opinion questioning the "judgment" of M-GB's counsel in committing himself to answer the interrogatories by March 11 "especially when he had not seen them" (App. A, pp. 14a-15a). This latter phrase was a reference to a previous sentence in the Court's opinion where it stated:

> "At the time of this commitment, M-GB *asserts* that its counsel had not seen a 114-page set of interrogatories with multiple subparts aggregating 1,150 questions and did not realize the inherent difficulty in supplying the answers" (App. A, p. 7a) [emphasis supplied].

This statement in context can hardly be said to constitute an "appellate finding" that M-GB's counsel had never seen the interrogatories. Moreover, the statement suggests that the Court questioned Counsel's judgment in making the commitment to answer interrogatories of this scope and nature whether or not he had previously seen them.

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[20] There was additional evidence in the record of the inadvertent nature of the failure to file answers which was not before the District Court at the time of its July 3, 1974 opinion and which was supplied in support of the July 15, 1974 motion for reargument. This included Mr. Wagman's Affidavit (R. 2886-3072) and the pretrial schedules prepared by Golenbock and Barell's managing clerk from which the June 14th date had been omitted (R. 3008, 3009). This new evidence removed any doubt as to the reasons for the failure to file the supplemental answers and the District Court should thereupon have vacated the dismissal. See *Gill* v. *Stolow*, 240 F.2d 669, 671-2 (2nd Cir. 1957).

The Third Circuit's conclusion that the District Court had "abused its discretion" in dismissing the complaint with prejudice was made upon a "thorough review" of the record in which all of the relevant factors were carefully weighed. We submit that such a scope of review was in all respects proper and that the decision below should not be disturbed on this ground. See *Diapulse Corp. of America* v. *Curtis Publishing Co., supra* (2nd Cir. 1967); *Gill* v. *Stolow, supra* (2nd Cir. 1957); *Fox* v. *Studebaker-Worthington, Inc.*, 516 F.2d 989 (8th Cir. 1975). Compare, *In re Josephson*, 218 F.2d, 174, 182 (1st Cir. 1954).

3. As a third reason for granting the writ, petitioners urge that it is "indispensable, that the district court take into consideration the antecedent procedural history of the case" and they suggest that the opinion below must be read as precluding consideration of antecedent procedural history by the District Courts in determining the application of sanctions. They contend that this Court should review the judgment of the Court below in light of the purposes of the 1970 amendments to Rule 37 which they argue were to "encourage more frequent imposition of sanctions" (Petition, pp. 19-20).

To begin with, the opinion below simply cannot be read in the manner petitioners suggest. To the contrary, the Third Circuit carefully considered the antecedent procedural history in reaching its determination that the "sanction of dismissal was improper under the circumstances of this case" (App. A, p. 17a). In thoroughly reviewing the procedural history of more than seventeen months, it determined that there were important "mitigating" circumstances and "extenuating factors" precluding the imposition of the drastic sanction of dismissal including (a) the fact that for eight months prior to February 20, 1974, the parties and the Court had permitted negotiations directed to so-called "inadequate" interrogatory answers and other discovery matters to languish

unresolved; (b) the fact that during the period prior to February 20, 1974, M-GB was represented by different counsel who had since become their adversary; (c) the "onerous burden" placed upon M-GB's new counsel of litigating this complex anti-trust case with almost no discovery materials; and (d) the fact that M-GB's new counsel had "exercised an enormous effort after they took control of the case" and had "worked frantically to complete discovery within the deadlines set by the Court" (App. A, p. 16a, 14a).

Clearly, there is no need to review the judgment below in order to "encourage more frequent imposition of sanctions" as suggested by petitioners. The Third Circuit never meant to suggest that the imposition of sanctions under Rule 37 was inappropriate here—only that the imposition of the most drastic sanction, dismissal with prejudice was improper. Indeed, the lower Court's failure to consider a lesser alternative sanction was one of the primary reasons that led the Third Circuit to reverse the District Court (App. A, p. 11a).

4. The fourth reason proffered by petitioners for granting the writ is that the Circuit Court erred when it sought to carefully distinguish between the conduct of M-GB and their present counsel in the period subsequent to February 20, 1974 on the one hand and the conduct of the litigation under Mr. Kohn prior to that time. They urge this Court to grant review so as to make clear that there should be no distinction made between the conduct of lawyer and client in determining whether to apply Rule 37 sanctions. Here, they point to language in *Link* v. *Wabash R.R.*, 370 U.S. at 633-34 which they suggest forecloses any such distinction in considering Rule 41 (b) dismissals. They argue that this "principle" should be extended to Rule 37 (Petition, pp. 20-22).

We suggest that this case with its unique facts is hardly one which lends itself to the fashioning of broad principles governing distinctions between conduct of lawyers and clients under Rule 37. Indeed, and as recognized by the Circuit Court, M-GB's prior counsel had become their adversary by the time of the settlement in February 1974 and moreover, had refused to make his files available to M-GB and their new counsel. Under these circumstances, the Third Circuit recognized that it would have been most inequitable to charge M-GB and their new counsel with any "delays and deficiencies" on Mr. Kohn's part (App. A, p. 14a), especially where the denial of files had deprived M-GB and their new counsel of access to materials necessary to respond to the NHL's contentions that there had been "defaults" by Mr. Kohn in the period prior to February 20th.[21]

In any event, we do not agree with petitioners' contention that *Link* "settled" any "principle" that Courts should not distinguish between the conduct of lawyer and client in determining whether to dismiss for want of prosecution under Rule 41 (b). In *Link*, the action had been pending for more than six years and the dismissal was premised on far more than counsel's dereliction in not attending a pre-trial conference. Indeed, Justice Harlan writing for the Court noted that it could reasonably be inferred from the drawn-out history of the litigation that "petitioner had been deliberately proceeding in 'dilatory fashion' ", 370 U.S. at 633.

Link has never been read by the Circuit Court as precluding them from distinguishing between the conduct of attorney and client in determining the propriety of a Rule

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[21] In this respect, those papers that were filed with the Court make clear that Mr. Kohn had at the relevant times prior to February 1974 disputed the NHL's contention that any "defaults" had occurred (See e.g. R. 806, 1172-82).

37 dismissal. In fact, the distinction has on many occasions been emphasized. See e.g. *DiGregorio* v. *First Rediscount Corp., supra; Fischer* v. *Buchl,* 45 F. 2d 950 (Third Cir. 1971); *Edsall* v. *Penn Central Transportation Co.,* 479 F.2d 33 (6th Cir. 1973), *cert. den.* 414 U.S. 1040 (1973); *Flaks* v. *Koegel, supra.* We submit that the courts must be left free to continue to consider this vital distinction, especially in view of the wide range of options confronting the District Judge under Rule 37.

5. Finally, petitioners urge that certiorari should be granted on the ground that the Third Circuit has "dictated to trial judges that their discretion to impose the sanction of dismissal is so narrowly circumscribed as to be virtually non-existent" and that this will "undermine the power of trial judges to control the discovery process and will encourage abuses of that process by litigants" (Petition, pp. 22-23). We do not agree.

Clearly, the District Court's range of discretion under Rule 37 to impose the drastic sanction of dismissal has always been considered to be narrow and subject to close examination on review. See *Fox* v. *Studebaker-Worthington Inc.,* 516 F.2d at 993. Within that narrow range—one which is circumscribed by due process considerations discussed in *Societe*—the Courts may still impose dismissal for conduct short of that in which a litigant would "verbalize his defiance of the court" (Compare Petition, p. 20). In fact, the Third Circuit has approved the imposition of a dismissal sanction for such conduct in the past[22] and there is no reason to believe that it will not do so in the future.

Petitioners' contention that the Third Circuit's decision will "undermine the power of trial judges to control the discovery process [or] . . . encourage abuses of that proc-

[22] See *Mangano* v. *American Radiator and Standard Sanitary Corp., supra;* and *Hastings* v. *Maritime Overseas Corp., supra.*

ess by litigants" is equally misplaced. The Second Circuit in reversing the District Court's dismissal in *Gill* v. *Stolow, supra,* addressed this issue squarely and said:

> "The proper disciplining of a party under circumstances of default is one of those necessary, but troublesome, questions which usually must be left to the control of the trial judge in the course of his administration of his court. Reluctant as we are to interfere, we feel that this is an occasion where, viewed with the hindsight afforded us by a study of the entire record, the penalty assessed is too drastic and the case must be returned to accord defendants a trial of the seriously contested issues of fact involved. In final analysis, a court has the responsibility to do justice between man and man; and general principles cannot justify denial of a party's fair day in court except upon a serious showing of willful default" 240 F.2d at p. 670.

The Third Circuit's application of this reasoning to the facts of the instant case is eminently correct and its decision to reverse, obviously made after carefully weighing the effects if any, upon the power of trial judges to control the discovery process, should be allowed to stand. In its supervisory capacity over the District Courts in its circuit, the Third Circuit rather than self-interested litigants such as petitioners, is in the best position to make this important policy judgment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be in all respects denied.

Dated: New York, New York
May 26, 1976

Respectfully submitted,

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